No. 87-1200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY;
BOARD OF TRUSTEES FOR ALABAMA A & M UNIVERSITY;
JOHN KNIGHT, et al.; and
NORMALITE ASSOCIATION, et al.,

Petitioners,

v.

AUBURN UNIVERSITY, et al.,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF CERTIORARI

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PETITIONERS' REPLY BRIEF IN SUPPORT OF CERTIORARI

Four sets of Alabama respondents have filed briefs in opposition to the petition for a writ of certiorari. They raise numerous arguments which threaten to obscure the real issues in this case more than to clarify them.[1]

The United States has also filed a brief in opposition. That brief agrees with petitioners that the court of appeals erred in requiring the disqualification of the district judge, and it agrees with petitioners that there is a conflict in the circuits. The United States, however, then parts company with the petition and asserts that certiorari should not be granted. Petitioners believe that the serious questions raised in the petition concerning the treatment of the recusal issue below have not been answered by any of the respondents,[2] that the conflict between the court below and other circuits is significant, and that certiorari should therefore be granted.

1. The treatment of the recusal issue in the court below was unorthodox in the extreme, and, despite filing 98 pages of briefs in opposition, none of the respondents seriously attempts to demonstrate the contrary.

The court of appeals ordered Judge Clemon recused on three grounds. Auburn has acknowledged that two of these, the ground relating to the Alabama State University Board

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[1] For convenience of citation, all the responses to the petition for certiorari will be cited as "Brief in Opposition," preceded by the name of the specific respondent, *e.g.*, "Auburn Brief in Opposition."

[2] Auburn begins by arguing that the recusal issue is insignificant because a new trial was required in any event as a result of the court of appeals' dismissal of the Title VI claims for lack of program specificity under the rule of Grove City College v. Bell, 465 U.S. 555 (1984). Petitioners do not agree that the dismissal of the Title VI claims, even if correct, would require a new trial (since the district court's findings rested equally or more heavily on the fourteenth amendment claims), but it is beside the point now that the court of appeals' ruling on Title VI has been overtaken by the passage of the Civil Rights Restoration Act, P.L. 100-259. Therefore, it is clear that a reversal on the recusal issue would reinstate the district court's decision.

of Trustees nominee and the ground relating to the Alabama A & M University appropriations bill, were in its possession while the case was still in the district court, in one instance at least a year *before* the trial; yet these grounds were saved until they could be presented in the first instance to the court of appeals. There, it is undisputed that the following things took place: (1) the grounds were entertained without the slightest inquiry about why they had been withheld, (2) the allegations were accepted as true without undergoing any factual scrutiny in any court, and (3) because there was no factual scrutiny, the court of appeals made factual findings—which was not its proper function in any event—which were utterly without foundation. These findings also were flatly in error.

The first ground alleged was that as a State Senator Judge Clemon played a key role in shaping the governing boards of the institutions which were parties to this case, including the claim that he blocked one nomination on racial grounds. Auburn's *sole* basis for this ground was a newspaper clipping, and that clipping was the *sole* basis for the court of appeals' decision that Judge Clemon should be disqualified on this ground. Pet. App. 23a-25a. No factual inquiry on this issue ever took place, nor could it have, since the clipping was never in the record.[3]

The second ground alleged was that as a State Senator Judge Clemon co-sponsored a bill to provide capital funds for A & M's physical plant. Auburn supported this ground by referring to a page of the Senate Journal showing the introduction of the bill, and showing the list of seven co-sponsors, one of whom was then-Senator Clemon. The court

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[3] It seems unimaginable to be arguing in this Court about the contents of the record below, but petitioners must say as firmly as possible that Auburn's statement that the news clipping "was in the record," Auburn Brief in Opposition, p. 8 n. 3, is a serious misrepresentation. The only appearance of the news clipping in the district court was its attachment as an exhibit to one deposition (the deposition of a witness who could not identify the clipping), and that deposition was never admitted at trial. Unfortunately, the unorthodox procedure of the court of appeals invited disputes such as this.

of appeals did not rely on the mere introduction of the bill, which would not have been disqualifying, but went on to embellish that fact with a series of additional "findings" that led it to disqualify Judge Clemon on this ground. Central to that decision was the court of appeals' "finding" that "the stated premise of this bill was that the facilities of A & M were inferior to those of the historically white universities." Pet. App. 25a. No factual inquiry ever took place concerning the A & M appropriations bill, and no evidence supports the court of appeals' "findings." The unreliability of the "findings" is typified by the fact that the central finding concerning "the stated premise of the bill" is plainly erroneous, as the slightest factual inquiry would have revealed.[4]

In its treatment of these issues,[5] the court of appeals repeatedly resolved disputed issues and *found* "facts" despite the absence of any inquiry either in the district court or in the court of appeals. These "facts" related to both the threshold issue of Auburn's timeliness in raising the alleged disqualifying grounds, and the substance of those grounds. Not surprisingly, in light of the procedures it followed, the court of appeals' "facts" as to both timeliness and substance are virtually devoid of evidentiary support,[6] and many of its "facts" remain a total mystery.

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[4] Because Auburn's Brief in Opposition, p. 9, echoes the court of appeals' finding about "the stated premise of the bill," petitioners have lodged a copy of the actual bill, S. 387, with the Clerk of this Court. No matter how many times one reads the entire bill, one will not find *any* "stated premise" or anything else remotely corresponding to the court of appeals' description.

[5] The third ground for recusal, Judge Clemon's role as a private practitioner in the case of Lee v. Macon County Bd of Educ., saw the court of appeals overturn findings of fact by the district court (Judge Dyer) without finding that he had committed plain error or, for that matter, even mentioning Judge Dyer's findings. This issue is addressed at pp. 7-9, infra.

[6] The court of appeals' statement that Auburn "did not discover relevant information about Judge Clemon's activities as a state legislator until late in the litigation, and raised this ground for disqualification

2. These procedures are at the heart of several serious conflicts between the lower court and other circuits, set forth in the petition.

a. Most significantly, the court of appeals entertained grounds for recusal which had not been raised below, and without remanding for determination of the facts. The petition cited cases in the Fifth, Sixth, and Ninth Circuits in which courts of appeals, confronted with newly raised grounds for recusal, have held that there must be a remand for development of a factual record, both as to timeliness and as to the merits of the grounds. Petition, pp. 15-16. In fact, *no* case cited by any of the respondents, and *no* case that petitioners have found, has ever followed the procedure used in the lower court in the instant case.[7]

The United States acknowledges the cases in other circuits in which remands were ordered, and cites no cases to the contrary, but suggests that there is no conflict because those cases all involved disputed factual issues. United States Brief in Opposition, p. 9. The United States does *not* say there were no disputed factual issues in the instant case, however, and it does not argue that the court of appeals said so; the United States says only that "the

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at the first available moment," Pet. App. 24a n. 49, is demonstrably wrong on both counts, and even Auburn's Brief in Opposition nowhere attempts to defend this position.

[7] Auburn's Brief in Opposition disagrees, but its cases contradict its position:

> The Court of Appeals' decision to entertain the disqualification issue without further proceedings in the district court does not conflict with other circuits. The Court of Appeals certainly had jurisdiction to rule on recusal issues in the first instance, see *Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980); *Potashnick v. Port City Construction Co., supra*, [609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980)]."

Auburn Brief in Opposition, p. 8 n. 3. The problem with this statement is that in both the *Price Brothers* and *Potashnick* cases the courts of appeals *did* remand to the district court for factual findings as to the newly raised grounds, and there is no suggestion in either case that they considered proceeding otherwise.

court of appeals *apparently concluded* that the facts material to the disqualification issue were not in dispute and that the issue could be resolved without further factfinding by a district court." *Ibid* (emphasis added). In petitioners' view, there can be no question that Auburn's grounds for recusal involved disputed issues of fact, that the court of appeals' acceptance of them without a remand conflicted with the cases in other circuits, and that the United States' strained reading of the cases simply underlines how clear the conflict in the circuits is.

b. The second major conflict had to do with the timeliness requirement. The petition cited cases in the Second, Fifth, and Ninth Circuits imposing a timeliness requirement, and a decision in the Seventh Circuit rejecting such a requirement. The decision below is unclear, since it both suggests that there is no timeliness requirement and holds that if there is such a requirement it was somehow met in this case.

In either event, however, the decision below is in conflict with other circuits. If, as petitioners believe, the court of appeals rejected any timeliness requirement, it conflicts with the circuits that impose such a requirement. If, as the United States believes, United States Brief in Opposition, p. 9, the court of appeals accepted a timeliness requirement but found that it was satisfied, its having made such "findings" without any remand or other factfinding process conflicts with the circuits that have ordered remands to develop factual records in connection with newly raised grounds for recusal.

The case of *United States v. Conforte*, 457 F. Supp. 641 (D. Nev. 1978), *aff'd*, 624 F.2d 869 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980), illustrates both prongs of the conflict. There, while Conforte was appealing a criminal conviction, he raised two separate grounds on which he alleged the district judge should have been disqualified. One ground arose from correspondence with the district judge over a bridge club membership, and the other arose from comments made by the judge at a party. The court

of appeals remanded the case to the district court to conduct an evidentiary hearing, and the district court made factual findings and ruled that recusal was unwarranted on either ground. As to the bridge club membership issue, the court found as a fact that Conforte had notice of the matter before trial,[8] so his raising of the issue when he did was untimely. As to the comment at the party, the court found as a fact that the issue was timely, because Conforte had not known about this matter previously, but that on the merits the facts did not support recusal under 28 U.S.C. § 455. The Ninth Circuit, in a detailed opinion by then-Judge Kennedy, affirmed both these rulings. The approach of the *Conforte* case is the standard one in other circuits, and it was disregarded in the instant case.

Moreover, timeliness should be a special concern in the instant case, because the deliberate withholding of new grounds for disqualification by a party which had already claimed that the judge's race undermines his impartiality, gives the appearance that it is continuing to pursue its improper racial objective through manipulation of the judicial process.[9]

c. The petition also cited a third conflict in the circuits, on the question whether a recusal order must be accompanied by retroactive relief granting a new trial. No respondent disputes that such a conflict exists. It is currently at issue in two cases pending in this Court. *Liljeberg v. Health Services Acquisition Corp.*, 796 F.2d 796 (5th Cir. 1986), *cert. granted*, No. 86-957 (argued December 9, 1987; to be reargued April 25, 1988); *Leaman v. Ohio Dept of Mental Retardation*, 825 F.2d 946 (6th Cir. 1987),

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[8] As Auburn did with regard to the ASU board nomination issue.

[9] Contrary to the United States Brief in Opposition, p. 10 n. 7, petitioners did not suggest that the disqualification *decision* was based on Judge Clemon's race. What petitioners *do* say, as stated on the referenced page, and as Judge Dyer found, is that the recusal *motion* was based on Judge Clemon's race. That motivation contributes to the importance of reviewing the decision below in order to make certain that such racially motivated tactics are not rewarded.

petition for cert. filed, No. 87-706 (Oct. 20, 1987). As the United States points out, United States Brief in Opposition, p. 10 n. 6, petitioners have not formally requested that this case be held pending the decision in *Liljeberg*, but unquestionably the decision in that case is likely to bear on some of the issues here.

3. Respondent Teague argues that any defects in the handling of Auburn's two new grounds for recusal were immaterial in light of the presence of a third ground for recusal, Judge Clemon's role in *Lee v. Macon County Bd of Educ.* Here again, however, the court of appeals overstepped its proper role by overturning district court findings of fact which were not plainly erroneous, and which it did not find to be plainly erroneous.

The original recusal motions had argued that Judge Clemon's participation as a lawyer in the case of *Lee v. Macon County Board of Education* gave him personal knowledge of the facts in the instant case. Judge Dyer exhaustively analyzed that claim and found that there were many *different* cases called *Lee v. Macon County*. Pet. App. 46a-48a, 53a-56a. One aspect of *Lee v. Macon County* involved desegregation in higher education and included some of the same parties who are defendants in the instant case; Judge Clemon was not involved in that aspect of *Lee v. Macon County*. There were approximately 100 *other* cases captioned *Lee v. Macon County*, however, each one involving a local (*i.e.*, city or county) system of elementary and secondary schools. These were entirely separate cases from the higher education component, and Judge Dyer so found. Judge Dyer analyzed the cases closely and found as a fact that Judge Clemon's involvement in two individual cases captioned *Lee v. Macon County* had nothing to do with the higher education case but was limited to the elementary and secondary school systems of Sumter County and the City of Anniston.

He found as a fact that these cases did not involve the same matter in controversy as litigation involving higher education. Pet. App. 54a. The court of appeals, however,

made a contrary finding of fact, holding that Judge Clemon's involvement with elementary and secondary education—even as limited to two small school systems—*was* the same matter in controversy as the instant case involving higher education. The linchpin of this holding was the admission into evidence in the instant case of a published report concerning attrition of black high school principals. The court of appeals did *not* hold that Judge Clemon had prior extra-judicial knowledge of the report.[10] Rather, it held that introduction of a report on the subject of high school principals in the instant higher education case showed that desegregation at the high school level was relevant to higher education, and, therefore, that Judge Clemon's prior access (as a lawyer) to facts relating to elementary and secondary education in the Anniston and Sumter County cases was the equivalent of access to disputed evidentiary facts in the instant case, *i.e.*, that Judge Clemon's Anniston and Sumter County cases *were the same case* as the instant case. In so holding, the court of appeals flatly reversed Judge Dyer's finding of fact in the district court that they were *not* the same case.[11] Yet, the court

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[10] The published report was cited in an earlier opinion, 453 F.2d 1104 (5th Cir. 1971), dealing with still another piece of *Lee v. Macon County* with which Judge Clemon was unconnected—the elementary-secondary school system in the Town of Muscle Shoals.

[11] The principal discussion of *Lee v. Macon County* is in the response of Wayne Teague, Superintendent of Education, which is filed jointly with the response of the Alabama State Board of Education. State Board Brief in Opposition, pp. 17-19. He argues that facts regarding desegregation of an elementary-secondary school system should be relevant to a higher education desegregation case. But the statutory question under 28 U.S.C. § 455(b)(1) is not whether the two topics raise similar legal issues, but whether the two are the same proceeding so that participation in one specific elementary-secondary education case would necessarily have given Judge Clemon "personal knowledge of disputed evidentiary facts concerning the [*i.e.*, *this*] proceeding."

Judge Dyer made a finding of fact that it did not. Neither the court of appeals nor respondent Teague has claimed that his finding was plainly erroneous, nor has there been any showing that it could have been. Petitioners have already shown why the mere introduction of an

of appeals, far from purporting to find that Judge Dyer had committed plain error, never mentioned Judge Dyer's finding *at all*, but simply substituted its finding for his. *Compare Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

4. Turning to the standing issue, the United States and, to a greater or lesser degree, the other respondents argue that there is no conflict in the cases because the court of appeals' holding did not bar Alabama State University and Alabama A & M University from making claims in their representative capacity on behalf of their students and faculty, or from making claims based on their Supremacy Clause-based obligation to obey the Constitution. Indeed, the United States and, to a greater or lesser degree, several other respondents, acknowledge that decisions of this Court and several circuits hold that parties who assert claims of the type raised by these petitioners do have standing to make such claims.

Instead, respondents argue that the decision below was limited to a holding that these state institutions cannot assert interests of their own as against the State, and that the decision simply presents petitioners with a pleading problem which requires them to allege the basis for standing more explicitly. But the University petitioners' pleadings, and their court of appeals' briefs, made it clear that the basis for realignment was their recognition of their obligation to promote desegregation and to protect the constitutional rights of their students and faculty. Those

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exhibit at trial was not sufficient to make the cases the same. Respondent Teague also says that *Lee v. Macon County* was mentioned many times during the trial, but that is a red herring because those references were to portions of *Lee v. Macon County* which established the basic law of desegregation in Alabama, chiefly 231 F. Supp. 743 (M.D. Ala. 1964); and 267 F. Supp. 458 (M.D. Ala.), aff'd, 389 U.S. 215 (1967). Those were portions of *Lee v. Macon County* in which, as Judge Dyer found, Judge Clemon was *not* involved.

(Respondent Teague does say, at p. 17, that Judge Clemon participated as counsel in the case reported at 317 F. Supp. 103 (M.D. Ala. 1970), aff'd, 453 F.2d 524 (5th Cir. 1971), but that is obviously and plainly wrong, and flatly contrary to the finding of Judge Dyer.)

pleadings further made it clear that actions of the State and state agencies, including defendants in this case, had prevented and were preventing the University petitioners from fully meeting their constitutional obligations and fully protecting the interests of their students and faculty.[12]

The court of appeals did not acknowledge these arguments or address the cases cited by the petitioners. Its decision conflicts with those other holdings, threatens the ability of the University petitioners to carry out their constitutional obligations, and creates the possibility that relief in this case, if subsequently held to be warranted, will fail to eliminate the longstanding vestiges of segregation and fail to cure the constitutional violations.[13]

5. The serious questions and conflicts raised by the court of appeals' decision in this case, and highlighted in the petition, have not been answered in the responses. Petitioners pray that this Court grant the writ of certiorari.

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[12] Several of these pleadings are printed as Appendices to the State Board Brief in Opposition, particularly Appendices C, E, F, and G.

[13] Several of the respondents raise a host of irrelevant and hypertechnical issues. For example, there is an assertion that the University petitioners' desire for realignment was simply in order to avoid having relief entered against them. Of course, the record in this case refutes that assertion, since the University petitioners acknowledged liability but sought *more extensive* relief. Another argument is that since the University petitioners were found by the court of appeals to have been improperly realigned, they were not parties in the court of appeals and therefore not entitled to petition this Court for review. This argument ignores the fact that the University petitioners consistently styled themselves appellees in the court of appeals, a status that was unquestionably correct since they were seeking to defend the judgment. That status was unaffected by the determination whether they were properly realigned as plaintiffs in the district court or whether they should have remained as defendants in the district court. Finally, several respondents argue that even if the petitioners' board members had constitutional obligations, the real parties were the universities or their boards of trustees as bodies rather than as individual members. This argument is meaningless, since the obligation to obey the Constitution applies equally to public bodies and their members. Compare Brandon v. Holt, 469 U.S. 464 (1985) (action against public official in his official capacity is tantamount to action against the official body).

Respectfully submitted,

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